Filed 1/23/19 P. v. Ridley CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CODY NED RIDLEY, Defendant and Appellant.	D074196 (Super. Ct. No. BAF1500978)

APPEAL from a judgment of the Superior Court of Riverside County, Elaine Kiefer, Judge. Affirmed as modified.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Robin Urbanski and Sharon L. Rhodes, for Plaintiff and Respondent.

Defendant Cody Ned Ridley was convicted of burglary, false imprisonment, making criminal threats, attempting to dissuade a victim, and violating protective orders, all perpetrated against his estranged wife, Jane Doe. He challenges the sufficiency of the evidence supporting his convictions for attempting to dissuade a victim and for residential burglary. We find substantial evidence supports the jury's findings on both charges. Ridley also contends, and the People agree, that the trial court erred in excluding a prior inconsistent statement proffered by Ridley. We accept the People's concession and find that the error was harmless. We also address sentencing issues raised by the parties and order corrections.

BACKGROUND

Statement of Case

A jury convicted Ridley of seven charges: count 1, making criminal threats (Pen. Code,[1] § 422); count 2, first degree residential burglary while a person was present (§§ 459, 667.5, subd. (c)(21)); count 3, dissuading a victim from reporting a crime maliciously and with force (§ 136.1, subd. (c)(1)); count 4, false imprisonment (§ 236); count 5, dissuading a victim (§ 136.1)[2]; count 6, violation of a criminal protective order (§ 166, subd. (a)(4)); and count 7, violation of a family court protective order (§ 273.6, subd. (a)).

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1 Further statutory references are to the Penal Code unless otherwise specified.

2 As discussed *infra*, the record provides mixed information on whether Ridley was convicted of section 136.1, subdivision (a)(2), or section 136.1, subdivision (b)(2).

Ridley waived a jury trial on allegations of prior convictions and admitted he had been convicted of two prior serious felony convictions that were also strikes. The trial court struck one of Ridley's prior convictions as a strike, but not as a serious felony.

The court sentenced Ridley to a total term of 19 years 4 months in prison. The court selected count 2, burglary, as the principal count and imposed the middle term of four years, doubled to eight years due to the strike prior. The court imposed middle terms on counts 1, 3, and 4 (two years, three years, and two years, respectively). Those terms were all to run concurrently with the term on count 2, burglary. The court found count 5, dissuading a witness, to be a separate event and imposed a consecutive term of one-third of the middle term, doubled to 1 year 4 months. Consecutive terms of five years were imposed for each of the two prior serious felony convictions. The court also imposed concurrent sentences of 180 days each on the two misdemeanor counts of violating a court order, counts 6 and 7. Ridley filed a timely notice of appeal.

Statement of Facts

Ridley and Jane Doe married in 2005. They had four children and lived in San Jacinto. Ridley separated from Doe and moved out of the home in January 2014. Doe filed for divorce the next month. As of September 2015, Ridley and Doe had been separated for about a year and a half. The divorce was still pending.

1. *Counts 1 to 4 - Criminal Threats, Burglary, False Imprisonment and Intimidating a Witness, September 14, 2015*

Ridley arranged to spend time with the children from Saturday, September 12 through Monday, September 14, 2015. Doe went to visit a friend in Los Angeles while

the children were with Ridley. Ridley texted her several times starting Sunday afternoon, September 13. He told Doe that he would bring the children back on Sunday instead of Monday. Doe replied that she was out of town and did not plan to be home. Ridley got upset and his tone became markedly hostile. For example, some of his texts were: "You better realize who you're fucking with, (Jane Doe)"; "Piss me the fuck off"; "And don't fucking lie to me, either"; "Move the fuck out of the house"; "Don't expect me to be considerate or anything. If I hear any bullshit, it's your fucking fault when bodies start dropping." Doe interpreted this last text as threatening danger to her and others. She was fearful. She was also scared by a text stating, "Put the shot (*sic*) in the fucking police report." Doe understood this to mean that Ridley did not care about the police, which made her more afraid.

Doe decided to hurry home to take care of the children. Doe called her mother, Mary D., and asked her to go to the house to receive the children when Ridley dropped them off. When Mary arrived, the children were inside and Ridley was outside, waiting. Ridley was angry, upset, and pacing. Ridley ranted about Doe and threatened to hurt her. After seven to ten minutes, Mary turned her phone on to record the conversation because she was in fear for Doe. This recording was played for the jury. Ridley complained that Doe told him that he could not control her. Ridley said, "Good luck with that," and that he would not stand for it. Ridley told Mary that Doe was "fucking naïve" and lacked the "street smarts" that Ridley had. He said that Doe did not have the "mentality to push to the pr—point to where you're about—you're going to commit murder." He said he would not let "this" go.

At 10:37 p.m. that night, Ridley's friend Dan H. called 911 and reported that Ridley had been threatening to kill his wife. Dan told the dispatcher that Ridley was delusional, and threatened to kill Doe, to blow up the house, and to shoot and kill everyone. Ridley told Dan that he would "put a fucking gun to her head and make her do what he wants her to do . . . with his kids there." Ridley texted Dan while Dan was talking to the 911 dispatcher. Ridley's text said, ". . . And if she isn't with me, then she's against me."

Doe received more threatening texts from Ridley as she was driving home. Ridley texted Doe at 10:56 p.m.: "You fucked up by lying to me" and "I hope you['re] ready." Doe interpreted this to mean she should be ready for his wrath. He continued, "You're only safe with me in prison or dead," and "The bodies would start dropping." Doe understood these texts to be threats to kill her, her friends, and anyone else that Ridley was displeased with. Doe feared for her life. She felt vulnerable, helpless, and insecure. At 11:42 p.m., he texted, "I'll never listen to you about how rough you have it. Bullshit. If you don't listen from here on out, I'll push you in a corner. I've paid the last bill I'll pay, truly. I'm not fucking around."

Doe arrived home after 11:00 p.m. Mary D. told Doe to be careful and stay away from Ridley. She did not tell Doe that Ridley had threatened to kill her because she did not want to scare Doe.

San Bernardino Sheriff's Deputy Robert Castellanos went to Doe's home at 11:38 p.m. and talked with Mary, who was upset. Doe, who had gone out to get food for the children, arrived home about 10 minutes after the officer arrived. She was upset and

crying. Deputy Castellanos did not think the texts were immediately threatening. Doe asked Deputy Castellanos not to contact Ridley if he was not going to arrest him, as it would make Ridley more upset. Deputy Castellanos advised Doe how to get restraining orders and left at about 12:45 a.m.

Ridley sent Doe a text at about 1:00 a.m. saying that he was going to jail. Doe thought that Ridley would not text anymore, so she went to sleep. At about 2:00 a.m., Ridley was in her bedroom, shaking her leg and calling her name to wake up. Doe tried to call 911, but Ridley grabbed the cell phone away from her, tossed it onto the floor near the door, and told her she had to listen to him. He said she should have taken him back. Doe was scared that Ridley was going to shoot her or choke her. Ridley threatened to kill Doe or anyone with her, including her family. Doe slowly got out of bed and moved toward the door. Ridley blocked her with his body. He was a foot taller than Doe and 90 pounds heavier than she was. He refused to let her leave or call for help for 30 to 40 minutes. All the while, Ridley continued to threaten Doe, her family, and her friends.

Doe finally inched near the door, picked up her phone, and convinced Ridley that she had to go downstairs to check on the children. Ridley followed Doe down the stairs, continuing to threaten her and her family, telling her that she had to do what he told her to do and that she should have taken him back. Doe was able to press the phone numbers for 911, and kept the phone hidden while moving slowly toward the stairs. She did not talk to the dispatch operator but kept the line open so that the operator could hear what was going on. A recording of the call was played for the jury. The jury heard Ridley say he was willing to pay a price that Doe was not willing to pay and talk about going to

prison for "life or death." He threatened again to kill Doe and her aunt and uncle. Ridley said their children's lives would be ruined with Doe not there and Ridley not there. He told Doe he would "pull the trigger" if Doe did not do what Ridley wanted her to do, as he had told Dan. Ridley said he would track her down after he got out of prison and kill her.

Doe asked Ridley if they could talk outside, so they would not wake the children. He agreed and followed her outside. Ridley told her that he had slashed her tires. Doe was scared for her life throughout this entire time. Doe was especially scared because Ridley had been violent before. He had once thrown one of their children, who was disabled and could not talk, against the headboard of the bed. When Doe went to help her child, Ridley grabbed Doe's head, threw her out of the room and across the hallway, pushed her to the floor, and put his weight on her chest and his hand over her neck. Ridley told her, "Don't piss me off, you don't know what I'm capable of." Another time, after Doe threw Ridley's phone and cracked the glass on it, Ridley slammed Doe against the wall and choked her to the point that she could not breathe. He told her, again, that she did not know what he was capable of.

While Doe and Ridley were talking outside, Deputies Castellanos and Ulises Otero arrived. Doe was scared, upset, and crying. She wanted to get away from Ridley. Doe told the officers that Ridley had slashed her tires. The officers arrested Ridley for making criminal threats and for vandalizing the tires.

Two days later, Doe told Deputy Otero her tires were deflated, not slashed, and she also reported this at the police station. Doe also spoke with Investigator Ted Ryan at the district attorney's office on March 9, 2016, and told him that the back windshield wiper had been broken off her car, and that the tires had been deflated, not slashed.

Ridley sent Doe messages in October 2015 apologizing for hurting and scaring her.

2. *Count 5 - Intimidating a Witness, March 23, 2016*

Doe testified that she had been subpoenaed to appear at Ridley's upcoming court hearing,[3] and that Ridley had called her on March 23 to tell her that he was having a hard time financially and was very stressed. He also told her not to show up at the court hearing because he was worried about "what's going to happen to him if he gets found guilty for what the charges they were putting on him." In a recorded portion of the phone call, Ridley said he needed Doe to sign a document recanting her statements about his September 2015 crimes, and stating that she would plead her Fifth Amendment right not to testify if subpoenaed to the court. He stated that if she did that, the prosecutor would not be able to talk to her.

3. *Counts 6 and 7 - Violating Court Orders, March 23, 2016 and May 2016*

In December 2015, Doe obtained a restraining order prohibiting Ridley from having any contact with her, except for the purpose of peaceful telephone contact with

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[3] The record shows that Doe was present in court on March 9 and was ordered to return on April 5, 2016, for a scheduled preliminary hearing. The jury was not informed of these details and heard only that Doe was subpoenaed for an upcoming court hearing.

the children. Ridley called on March 23, 2016, and talked with his children for about 40 minutes, then spoke with Doe and tried to dissuade her from going to court and testifying against him, as described above.

Doe obtained a protective order on April 28, 2016, prohibiting Ridley from having any contact with her except for contact allowed under the order. On at least two different days in May 2016, Ridley sent Doe text messages, music videos, love songs and scriptures — none of which was permitted under the order.

DISCUSSION

1. *Count 5 - Intimidating a Witness*

On March 23, 2016, Ridley told Doe not to go to the upcoming court proceeding, to recant her prior statements, and to invoke her Fifth Amendment rights so that the prosecutor would not be able to talk with her. He was charged in Count 5 and convicted of dissuading a witness in violation of section 136.1[4] for these statements. Sufficient

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4 Penal Code section 136.1 provides:

"(a) Except as provided in subdivision (c), any person who does any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison:

"(1) Knowingly and maliciously prevents or dissuades any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.

"(2) Knowingly and maliciously attempts to prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law.

[¶] . . . [¶]

"(b) Except as provided in subdivision (c), every person who attempts to prevent or dissuade another person who has been the victim of a crime or who is witness to a crime from doing any of the following is guilty of a public offense and shall be punished by imprisonment in a county jail for not more than one year or in the state prison:

evidence supports this conviction, even though there is some confusion of the specific subdivision of section 136.1 of which he was convicted.

On review for sufficient evidence we apply a well settled standard. "[W]e must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. We review the entire record in the light most favorable to the judgment below to determine whether it discloses sufficient evidence—that is, evidence that is reasonable, credible, and of solid value—supporting the decision, and not whether the evidence proves guilt beyond a reasonable doubt. [Citation.] We neither reweigh the evidence nor reevaluate the credibility of witnesses. [Citation.] We presume in support of the judgment the existence of every fact the jury reasonably could deduce from the evidence. [Citation.] If the circumstances reasonably justify the findings made by the trier of fact, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding."

"(1) Making any report of that victimization to any peace officer or state or local law enforcement officer or probation or parole or correctional officer or prosecuting agency or to any judge.

"(2) Causing a complaint, indictment, information, probation or parole violation to be sought and prosecuted, and assisting in the prosecution thereof.

[¶] . . . [¶]

"(c) Every person doing any of the acts described in subdivision (a) or (b) knowingly and maliciously under any one or more of the following circumstances, is guilty of a felony punishable by imprisonment in the state prison for two, three, or four years under any of the following circumstances:

"(1) Where the act is accompanied by force or by an express or implied threat of force or violence, upon a witness or victim or any third person or the property of any victim, witness, or any third person."

(*People v. Jennings* (2010) 50 Cal.4th 616, 638–639; *Jackson v. Virginia* (1979) 443 U.S. 307, 318–319.)

The elements of 136.1, subdivision (a)(2), alleged in the amended information, are that the defendant knowingly attempted to dissuade a witness or the victim from attending or giving testimony at any legally authorized proceeding. Doe testified that on March 23, 2016, she had been subpoenaed for a court hearing. Ridley asked her not to show up at that hearing, pressuring her emotionally by telling her that he was having a hard time financially and was very stressed. This evidence and reasonable inferences drawn therefrom support a conviction under subdivision (a)(2).

Ridley argues that the only charge pending against him in March 2016 was vandalism. However, he had committed additional crimes against Doe, i.e. breaking into her house, falsely imprisoning her, and dissuading her from being a witness, and was arrested in September for making criminal threats as well as for vandalism. If Ridley thought that he would be prosecuted only for vandalism, he would not have needed Doe to recant her statements and refuse to testify at the upcoming court hearing, as she had already told the police that Ridley had deflated, not slashed, her tires. No reasonable jury would believe that Ridley was trying to prevent Doe from testifying only about slashing her car tires.

The People claim that Ridley was convicted of subdivision (b)(2) of section 136.1, rather than of subdivision (a)(2), because the jury found in its verdict that Ridley dissuaded or attempted to dissuade a witness from cooperating or providing information so that a complaint or information could be prosecuted, and from helping to prosecute

that action. Doe was a victim of several crimes, and Ridley knew and intentionally tried to prevent Doe from cooperating in the prosecution of a criminal action when he told her not to go to court, to recant her testimony and to assert her Fifth Amendment right so the prosecutor could not question her.

The People urge Ridley impliedly consented to this amendment by failing to object to the particular change that was submitted to the jury. Although the amended information charged Ridley in count 5 with a violation of section 136.1, subdivision (a)(2), the instruction given recited the elements of section 136.1, subdivision (b)(2), attempting to persuade a witness or victim not to cooperate with a prosecutor. The court instructed the jury that it had to find three elements to hold Ridley guilty: (1) Ridley tried to prevent or discourage Doe from cooperating or providing information to support criminal charges and to help in prosecuting that action; (2) Doe was a crime victim[5]; and (3) Ridley knowingly intended to prevent Doe from cooperating in the prosecution of a criminal action. Ridley did not object to this instruction when it was discussed or when it was given. He also approved the verdict form that used the subdivision (b) language to "dissuade a witness or attempt to dissuade a witness from cooperating or providing information so that a complaint or information could be sought and prosecuted, and from helping to prosecute that action." He impliedly consented to being tried under subdivision (b) for discouraging Doe from cooperating in the prosecution of crimes

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5 All subdivisions of the statute apply to both victims of and witnesses to crimes. (§ 136.1.)

against him. (*People v. Goolsby* (2015) 62 Cal.4th 360, 367 (*Goolsby*); *People v. Toro* (1989) 47 Cal.3d 966, 969–970, 976–977 (*Toro*), disapproved on other grounds in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3.)

In *Toro*, the defendant was convicted of an uncharged lesser related offense and complained on appeal that he had no notice of it. (*Toro*, *supra*, 47 Cal.3d at pp. 970–971.) The Supreme Court held the conviction valid because the defendant impliedly consented to the jury's consideration of the uncharged offense by failing to object to instructions and a verdict form on that offense. (*Id*. at pp. 976–977.) The court stated, "It has been uniformly held that where an information is amended at trial to charge an additional offense, and the defendant neither objects nor moves for a continuance, an objection based on lack of notice may not be raised on appeal. [Citations.] There is no difference in principle between adding a new offense at trial by amending the information and adding the same charge by verdict forms and jury instructions." (*Id*. at p. 976, fn. omitted.) Following *Toro*, the Supreme Court in *Goolsby* found that an information was constructively amended to include an uncharged offense because the defendant had not objected to instructions to the jury on that uncharged offense. (*Goolsby*, *supra*, 62 Cal.4th at p. 367.) Constructive amendment of the information by use of different instructions and verdict form is akin to the trial court amending the information after the close of trial to conform to the proof at trial, which is permitted when the defendant's substantial rights are not prejudiced. (*People v. Fernandez* (2013) 216 Cal.App.4th 540, 544.)

Ridley argues that we cannot, in effect, amend the information on appeal, citing *People v. Ochoa* (2016) 2 Cal.App.5th 1227, 1231–1232 and *People v. Hamernik* (2016) 1 Cal.App.5th 412, 425. Those cases are not applicable here, however, because in both of those cases the defendant objected to prosecution under a different statute and the People were thus aware of the deficiency in the information. (*Ochoa*, at p. 1232; *Hamernik*, at pp. 424–426.) Ridley did not object to the form of the instructions and verdict. He did not put the People on notice of the discrepancy between the information and the instructions and verdict. After argument, Ridley's attorney objected that the prosecutor argued that Ridley violated count 5 by trying to prevent Doe from cooperating with the prosecution, but only on the ground that count 5 applied only to vandalism. The trial court said that was "completely an incorrect analysis of what the Court said," and agreed with the prosecutor that witness intimidation was not limited to charged crimes. Ridley impliedly consented to the variance between the subdivision alleged in the amended information and the subdivision described in the instruction and in the verdict form. (*Toro*, *supra*, 47 Cal.3d at pp. 976–977; *Goolsby*, *supra*, 62 Cal.4th at p. 367.)

Toro, *Fernandez*, *Ochoa* and *Hamernik* rely heavily on the due process right to notice, which Ridley does not contest here. The evidence at the preliminary examination gives a defendant the notice that is due, as long as the substantial rights of the defendant are not prejudiced. (*Goolsby*, *supra*, 62 Cal.4th at p. 367; *People v. Jones* (1990) 51 Cal.3d 294, 317.) Preliminary hearing testimony gave notice of trying to persuade Doe not to cooperate with the prosecution (subdivision (b)(2)), as well as trying to persuade her not to attend a court proceeding (subdivision (a)(2)), so Ridley had notice of both

charges sufficient to satisfy due process. Ridley's substantial rights were not prejudiced because he would be no worse off than he is now if the information had been amended at trial to allege a violation of section 136.1, subdivision (b)(2). Instead of arguing lack of his due process right to notice, however, Ridley contends that the evidence at trial was insufficient to support the charged offense, section 136.1, subdivision (a)(2). As we have held, the evidence was sufficient.

Substantial evidence supported Ridley's conviction on count 5, under either subdivision of section 136.1. Both charges were legally correct. And Ridley had notice of both charges from the preliminary hearing. We find that no error occurred.

2. *Sufficient Evidence Supports the Burglary Conviction Because Ridley Had No Possessory Interest in the Home*

Ridley had an ownership interest in the family home and paid the mortgage on it. However, he had no possessory interest in the home after he moved out in January 2014, more than 18 months before he broke into the home in the middle of the night to terrorize Doe. Therefore, sufficient evidence supported his first degree residential burglary conviction.

Entry into a residence is burglary if it invades a possessory right in a building. A burglary is "an entry which invades a *possessory right* in a building. And it . . . must be committed by a person who has no right to be in the building." (*People v. Gauze* (1975) 15 Cal.3d 709, 714 (*Gauze*), emphasis added; *People v. Garcia* (2016) 62 Cal.4th 1116, 1125 [one purpose of burglary statute is "to prevent the invasion of an owner's or occupant's *possessory interest* in a space against 'a person who has no right to

be in the building"].) " 'The possessory right protected by section 459 is the "right to exert control over property to the exclusion of others" or, stated differently, the "right to enter as the occupant of that structure." [Citation.]' [Citation.]" (*People v. Smith* (2006) 142 Cal.App.4th 923, 932.)

When, as here, a spouse has a community property interest in a home, but has moved out of the home, he no longer has a possessory right to the home and has no right to enter the residence without permission. (*People v. Ulloa* (2009) 180 Cal.App.4th 601, 607–609 (*Ulloa*); *People v. Gill* (2008) 159 Cal.App.4th 149, 161 (*Gill*); *People v. Sears* (1965) 62 Cal.2d 737, 740, 746 (*Sears*), overruled on other grounds in *People v. Cahill* (1993) 5 Cal.4th 478, 510, fn. 17.) In *Ulloa*, the defendant had separated from his wife and voluntarily moved out of their jointly leased apartment four months earlier. (*Ulloa*, at p. 606.) The appellate court upheld the defendant's burglary conviction, finding that although the defendant had a possessory interest in the apartment under the lease, that possessory interest was not unconditional. (*Id*. at pp. 606–607, 610.) The defendant's act of breaking the door to get into the apartment and a history of domestic violence confirmed the finding of burglary. (*Id*. at p. 610.) Even more striking, in *Gill*, the defendant had moved out of the home only a day before and gave the keys to his wife. The wife had been denied an emergency protective order and had no court order granting her exclusive rights to the house. (*Gill*, at p. 152.) The defendant broke into the home the next day and threatened, sexually assaulted, and kidnapped his wife. (*Id*. at pp. 153–154.) The court affirmed the burglary conviction because the defendant had given up his

unconditional right to enter the home by leaving voluntarily, giving up his house keys, and staying away from the home. (*Id*. at p. 161.)

In *Sears*, the Supreme Court stated that the defendant had no right to enter the residence of another without permission and could be convicted of burglary when he had moved out of the family home three weeks before returning, unlawfully entering the home and murdering his spouse. (*Sears*, *supra*, 62 Cal.2d at p. 746.) It stated that even if the defendant could properly enter the house for a lawful purpose, that entry would still be a burglary if the defendant entered with the intent to commit a felony inside the house. (*Ibid*.) This statement was dictum because the court reversed the finding of felony murder based on the admission of statements improperly obtained. The court provided this analysis of burglary for guidance on remand. (*Id*. at pp. 745–746.) The court in *Gauze* recognized the continuing vitality of the *Sears* reasoning, but contrasted the situation in *Gauze*, where the defendant had an unconditional possessory right to the apartment that he entered because he was renting and currently living in the apartment at the time he entered and assaulted his roommate with a gun. (*Gauze*, *supra*, 15 Cal.3d at pp. 714–715.)

Because Ridley had moved out of the home more than 18 months earlier he had no unconditional possessory right to enter the home. His entry in the middle of the night for the purpose of threatening to kill Doe supported his conviction for burglary.

3. *The Trial Court's Error in Excluding Dan's Prior Inconsistent Statement Was Harmless*

The trial court erred in not permitting Dan's prior inconsistent statement to be admitted at trial in order to impeach his hearsay statements on his phone call to the 911 dispatcher. The error was harmless, however, because, among much other damning evidence, the jury heard a recording of Ridley threatening to kill Doe and her family and of Ridley admitting that he told Dan he would kill Doe.

Dan did not appear for trial despite having been ordered to appear by the court. Ridley moved to exclude Dan's 911 call as hearsay. The court correctly ruled that Dan's statements to the 911 operator were not testimonial and were admissible as excited utterances. Ridley sought to impeach Dan by admitting Dan's statement to Investigator McDonald that he remembered Ridley saying that he wanted to kill himself, but not that he wanted to kill Doe. The court denied the request. The trial court erred because the evidence was admissible as impeachment under Evidence Code section 1202.[6] When hearsay evidence is admitted, section 1202 permits impeaching evidence even though the declarant does not have an opportunity to explain the inconsistency. (*People v. Blacksher* (2011) 52 Cal.4th 769, 809; *People v. Baldwin* (2010) 189 Cal.App.4th 991, 1003;

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6 "Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing. . . ." (Evid. Code, § 1202.)

People v. Corella (2004) 122 Cal.App.4th 461, 471 (*Corella*).) This rule "assure[s] fairness to the party against whom hearsay evidence is admitted without an opportunity for cross-examination." (*Corella*, at p. 470.)

This error in exclusion of evidence is reviewed under the *Watson*[7] standard — whether there is any reasonable probability that the defendant would have achieved a more favorable result absent the error. (*Corella*, *supra*, 122 Cal.App.4th at p. 472, citing *People v. Watson*, *supra*, at p. 836.) There is no reasonable probability of a different result even if Dan's prior inconsistent statement had been admitted to impeach his statements to the 911 dispatcher. The jury heard Ridley admit that he told Dan that he threatened to kill Doe. On the 911 recording while Ridley was in Doe's house, Ridley said, "You're gonna listen to what the fuck I say, or I will pull the trigger. . . . That's the truth. I told Dan that on the phone." The jury also heard first hand Ridley's threats to Doe on that recording. Ridley said, ". . . I'll kill Anne, Hector—all of you. I'll kill them all. . . . [T]hat's the price that you pay. . . ." "And after I get out [of prison], you better hope to God you're running to fucking New York because I'll hire a P.I. for $3,000, and he'll find your ass so I can fucking kill you."

In addition, Doe testified that she feared Ridley would kill her when he was blocking her inside her bedroom. Responding deputies found her extremely upset, scared and crying. Dan was a friend of Ridley's, so his attempt to help Ridley after the crisis had passed was not very credible when compared to his spontaneous, excited statements to

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7 *People v. Watson* (1956) 46 Cal.2d 818.

the 911 dispatcher on the day of the crime. There is no reasonable probability that Ridley would have received a more favorable result even if Dan's prior impeaching statement had been admitted at trial.

4. *The Sentences for Count 1, Making a Criminal Threat and Count 4, False Imprisonment Must Be Stayed*

The trial court selected burglary, count 2, as the principal term of imprisonment, and imposed concurrent sentences on the crimes of making criminal threats and false imprisonment. This was error, as the three crimes all arose from an indivisible course of conduct. The sentences on counts 1, making a criminal threat, and 4, false imprisonment, must be stayed.

Section 654[8] prohibits punishment for multiple offenses arising from the same act or from an indivisible course of conduct. When an act is punishable in different ways, the defendant cannot be punished under different provisions of the law. " ' "Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." ' " (*People v. Jackson* (2016) 1 Cal.5th 269, 354.) Whether defendant acted with multiple intents is a question of fact for the trial

8 Section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

court and will not be disturbed if it is supported by substantial evidence. (*Id*. at p. 886.) Punishment under multiple provisions for a single act or course of action is an unauthorized sentence that can be corrected on appeal even if the defendant fails to object in the trial court. (*People v. Islas* (2012) 210 Cal.App.4th 116, 129, fn. 3 (*Islas*).)

The trial court instructed the jury that to find Ridley guilty of burglary, it had to find that he entered the building with the intent to make criminal threats and/or to falsely imprison Doe. The prosecutor repeated this direction in closing argument. At sentencing, the trial court found that making criminal threats, dissuading a witness with force, and false imprisonment all occurred on the same occasion and depended on the same operative facts.[9]

A defendant generally acts with a single intent when he breaks into a building with the intent to commit a crime and commits the intended crime. (*Islas*, *supra*, 210 Cal.App.4th at p. 130 [burglary with intent to commit felony false imprisonment]; *People v. Centers* (1999) 73 Cal.App.4th 84, 98 [burglary and kidnapping]; *People v. Hester* (2000) 22 Cal.4th 290, 293–294 [burglary with intent to assault and assault].) Based on the instructions to the jury and the trial court's finding at sentencing, the court could not conclude that Ridley had separate objectives and intents when breaking into Doe's home.

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9 In running the sentences on counts 1, 3 and 4 concurrently, the trial court said it had discretion under section 1170.1. That section says nothing about crimes arising on the same occasion or from the same operative facts. The court likely was referring to section 667, subdivision (c)(6). That subdivision mandates in strike cases that felonies not committed on the same occasion and not arising from the same operative facts must be sentenced consecutively, leaving discretion for the court to run the sentences concurrently. (§ 667, subd. (c)(6).)

The sentences for counts 1 and 4, making criminal threats and false imprisonment, should have been imposed and stayed instead of imposing them concurrently to the burglary sentence. Because the jury and the court made findings of fact about Ridley's intent in committing burglary, the concurrent sentences were not authorized under section 654. We remand the case with directions to the trial court to stay the sentences for counts 1 and 4.

5. *The Court Imposed Sentences on the Misdemeanors*

On July 19, 2017, by stipulation of the parties, the trial court sentenced Ridley to concurrent terms of 180 days on each of his two misdemeanor convictions for violating court orders. The court ordered the abstract to be amended accordingly. The trial court had jurisdiction to make this correction because the failure to sentence on those two counts was unauthorized by law. A sentence unauthorized by law can be corrected at any time. (*Islas, supra*, 210 Cal.App.4th at p. 129 & fn. 3.)

6. *Applicability of New Law*

At oral argument, Ridley raised the issue of the applicability of Senate Bill 1393, amending sections 1385, subdivision (b), and 667, subdivision (a), to give trial courts discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1–2.) This law went into effect on January 1, 2019. We directed the parties to file supplemental briefing addressing the applicability of this new legislation. The People agree that this law will apply to Ridley after it becomes effective, in accordance with *In re Estrada* (1965) 63 Cal.2d 740, 744–745 [absent evidence of contrary legislative intent, "it is an inevitable inference" that the Legislature intends

ameliorative criminal statutes to apply to all cases not final when the statutes become effective], and *People v. Garcia* (2018) 28 Cal.App.5th 961 (*Garcia*) [S.B. 1393 is retroactive to cases not yet final on appeal]. On remand, the court should exercise its discretion in determining whether to impose, strike or dismiss one or both of the five-year enhancements under section 667, subdivision (a).

DISPOSITION

This case is remanded for the trial court to stay the terms imposed for making criminal threats and false imprisonment in counts 1 and 4 pursuant to section 654. We further direct the trial court to consider retaining, striking or dismissing the two enhancements for the serious prior felony convictions. The trial court is directed to prepare an amended abstract of judgment and send it to the Department of Rehabilitation and Corrections. The judgment is affirmed in all other respects.

BENKE, Acting P. J.

WE CONCUR:

DATO, J.

GUERRERO, J.